

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Implementation of the
Telecommunications Act of 1996:

Telemessaging,
Electronic Publishing, and
Alarm Monitoring Services

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CC Docket No. 96-152

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BELLSOUTH COMMENTS

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SUMMARY

The Commission has proposed in the *Notice* to implement the statutory requirements of the 1996 Act addressing electronic publishing services by the BOCs (Section 274), alarm monitoring services by the BOCs (Section 275), and telemessaging services by the BOCs and other LECs (Section 260). In “implementing” these provisions, the Commission must refrain from exceeding its authority or imposing regulation where none is anticipated under the 1996 Act. The Commission must be careful not to overstep the boundaries established by Congress by adding to the restrictions or embellishing the safeguards contained in the Act. Indeed, given the extraordinary level of detail set forth in Sections 260, 275, and 274, particularly, it is questionable whether there is a need for *any* rules, other than ones that simply incorporate the statutory language.

The Commission’s jurisdiction over intrastate telemessaging, electronic publishing, and alarm monitoring is limited by Section 2(b) of the Communications Act. Absent an express grant of authority in Section 274, 275, or 260 over intrastate matters, the Commission’s reach is “fenced off” by Section 2(b), subject only to the impossibility exception of *Louisiana PSC*. Moreover, any explicit grant of jurisdiction over intrastate matters must be narrowly construed to avoid running afoul of the generic restrictions of Section 2(b).

In Section 274, Congress set forth in considerable detail the structural separation, joint marketing, and nondiscrimination obligations that are placed on the required separate affiliate or electronic publishing joint venture and that define how such an entity is to be “operated in accordance with this section.” The fact that Congress set forth such comprehensive and detailed requirements instead of expressly leaving the details for the Commission to complete

demonstrates that the structural separation, joint marketing, and nondiscrimination requirements of Section 274(b)-(c) are complete unto themselves. Accordingly, the Commission should avoid taking any action that would impose burdens on BOCs' permitted electronic publishing activities beyond those already enumerated by Congress.

In particular, the Commission should be circumspect in "clarifying" the scope of the "operated independently" standard of Section 274(b). The "operated independently" standard was adopted by Congress to describe the permissible and impermissible relationships between a BOC and an electronic publishing separated affiliate or joint venture. To the extent Congress saw a need for refinement of the meaning of this standard, it has already provided the necessary explication.

Similarly, the Commission should avoid an interpretation of Section 275 that would render unlawful otherwise lawful relationships between a BOC and an alarm monitoring service provider. Thus, the Commission should conclude that billing and collection, sales agency, marketing, and various compensation arrangements (including revenue sharing), do not rise to the level of "engag[ing] in the provision of alarm monitoring services." Permitting these relationships is consistent with the only defined constraints on a grandfathered BOC's expansion of its alarm monitoring services, *i.e.*, "acquir[ing] any equity interest in, or obtain[ing] financial control of, any unaffiliated alarm monitoring service entity" for the same five-year period that non-grandfathered BOCs are precluded from "engag[ing] in the provision of alarm monitoring services." The same standard should hold true for non-grandfathered BOCs -- no "engag[ing] in the provision of alarm monitoring services" through an "equity interest in" or "financial control of" an alarm monitoring service provider, but relationships short of that remain permitted.

Nor is there a need for the Commission to adopt new implementing regulations under Section 260. BOCs have been providing intraLATA telemessaging services on an integrated basis under the Commission's Computer III and ONA policies and programs for a number of years. These rules are effectively subsumed by the nondiscrimination requirements of Section 260(a).

Finally, absent a statutory exception, which the 1996 Act does not provide, the Commission cannot shift the burden of proof to the BOC in complaint or injunctive proceedings, except to the extent the BOC raises an affirmative defense, similar to the defense of justification in a Section 202(a) discrimination case. The 1996 Act does not require a BOC to prove a negative every time the Commission entertains a complaint, and the Commissions cannot require it.

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BELLSOUTH COMMENTS

BellSouth Corporation, for itself and on behalf of its affiliated companies ("BellSouth"), hereby submits these comments in response to the Commission's *Notice of Proposed Rulemaking*, CC Docket No. 96-152, FCC 96-310, (released July 18, 1996) (*Notice*). In the *Notice*, the Commission has requested comment on proposed regulations to implement and/or clarify the non-accounting separate affiliate and nondiscrimination safeguards prescribed by Congress in Sections 274, 275, and 260 of the Communications Act, as added by the Telecommunications Act of 1996 (the "1996 Act"),¹ with respect to Bell Operating Company ("BOC") and/or other local exchange carrier ("LEC") provision of electronic publishing, alarm monitoring, and telemessaging services, respectively.

I. INTRODUCTION

The Commission has proposed in the *Notice* to implement the statutory requirements of the 1996 Act addressing electronic publishing services by the BOCs (Section 274), alarm

¹ Pub. L. No. 104-104, 110 Stat. 56 (1996).

monitoring services by the BOCs (Section 275), and telemessaging services by the BOCs and other LECs (Section 260). Section 274 prohibits a BOC from providing electronic publishing services, permitting such activity only through a separated affiliate or joint venture with a third party. Section 275 prohibits a BOC's provision of alarm monitoring services entirely for a matter of years, subject to limited grandfathering provisions. Section 260 imposes nondiscrimination obligations on BOCs and other LECs offering telemessaging services. The Commission has further suggested that to the extent a BOC offers an interLATA telemessaging service, it would also be subject to the separate affiliate requirements of Section 272.

In "implementing" these provisions, the Commission must refrain from exceeding its authority or imposing regulation where none is anticipated under the 1996 Act. The Commission must be careful not to overstep the boundaries established by Congress by adding to the restrictions or embellishing the safeguards contained in the Act. Indeed, given the extraordinary level of detail set forth in Sections 260, 275, and 274, particularly, it is questionable whether there is a need for *any* rules, other than ones that simply incorporate the statutory language.

There is also another reason for the Commission to be circumspect in its construction of the 1996 Act. Electronic publishing services, alarm monitoring services, and telemessaging services are all information services under the Act.² As information services, all of these activities

² The Act defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing. . . ." 47 U.S.C. § 3(20). Subject to certain exceptions, electronic publishing is further defined to mean

the dissemination, provision, publication, or sale to an unaffiliated entity or person, of any one or more of the following: news (including sports); entertainment (other than interactive games); business, financial, legal, consumer, or credit materials; editorials, columns, or features; advertising; photos or images; archival or research material; legal notices

(Continued...)

constitute speech fully protected by the First Amendment. As such, the separate affiliate requirement for electronic publishing of Section 274, the prohibition on alarm monitoring services of Section 275, and the separate affiliate requirement of Section 272 that the Commission proposes to apply to BOCs' interLATA telemessaging operations all impose impermissible prior restraints on BOCs' speech activities. Moreover, to the extent these sections (together with Sections 271, 273 and 276) single out the BOCs by name and impose special line of business restrictions on them alone, these sections violate the principle against trial by legislature embodied in Articles I and III of the Constitution, and more specifically, the Bill of Attainder Clause, Art I, § 9, cl. 3.

Although the Commission has no discretion to ignore Congress' mandate of a separate affiliate or prohibition of certain activity, the Commission may be able to avoid or minimize some of the constitutional tension by construing certain provisions of the 1996 Act narrowly. For example, where Section 260 imposes no separate affiliate requirement on BOCs' telemessaging operations, the Commission should avoid engrafting on such activities the constitutionally-infirm separate affiliate requirements of Section 272 for interLATA information services.³ Thus, the Commission should conclude that neither intra- nor interLATA telemessaging services must be offered through a separate affiliate. Similarly, the Commission should narrowly construe the scope of activity it considers to be alarm monitoring services under Section 275 to avoid sweeping

or public records; scientific, educational, instructional, technical, professional, trade, or other literary materials; or other like or similar information.

47 U.S.C. § 274(h)(1).

³ See Section V, *infra*.

restraints on constitutionally protected conduct.⁴ As the Commission moves forward with this proceeding, it should exercise its utmost efforts to save the statute by avoiding far-reaching interpretations or extrapolations of already suspect provisions of the Act.

II. SCOPE OF THE COMMISSION'S AUTHORITY

A. Telemessaging Services

In the *Notice*, the Commission recites its tentative conclusion from its companion *BOC In-Region NPRM*⁵ that Sections 271 and 272 of the 1996 Act give the Commission jurisdiction over both intrastate and interstate interLATA information services provided by the BOCs, including telemessaging services. Based on this tentative conclusion, the Commission then suggests that Section 260 may be read to extend the Commission's jurisdiction to all intrastate telemessaging services for purposes of implementation of that Section.⁶ Such a gratuitous reading of the Commission's authority cannot be sustained.

The errors in the Commission's analysis lie first in the tentative conclusion presented in the *BOC In-Region NPRM*. In comments in that proceeding, BellSouth⁷ and others⁸ have shown that while Congress plainly intended to supplant the provisions of the MFJ that restrained the BOCs'

⁴ See generally, Section IV, *infra*.

⁵ *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act, as amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, CC Docket No. 96-149, *Notice of Proposed Rulemaking*, FCC 96-308 (rel'd July 18, 1996) ("*BOC In-Region NPRM*").

⁶ Notice at ¶ 20.

⁷ Comments of BellSouth Corporation, CC Docket 96-149 (filed Aug. 15, 1996).

⁸ See, e.g., respective comments of Florida Public Service Commission, California Public Utilities Commission, New York State Department of Public Service, National Association of Regulatory Utility Commissioners, CC Docket NO. 96-149 (filed Aug. 15, 1996).

provision of all interLATA services, including interLATA information services, Congress did not intend to give the Commission plenary jurisdiction over intrastate interLATA services. Rather, Section 2(b)(1) continues to deprive the Commission of jurisdiction over “charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier,”⁹ except where express Congressional delegation of authority overrides these generic constraints.¹⁰ Hence, the Commission’s jurisdiction over intrastate interLATA information services, including telemessaging services, is limited to those responsibilities specifically indicated in the Act.

In light of these continuing limitations on the Commission's authority over intrastate interLATA information services, including telemessaging services, reliance on the over-broad jurisdictional claims under Sections 271 and 272 from the *BOC In-Region NPRM* as the predicate for extending the Commission’s reach to all intrastate telemessaging services under Section 260 becomes bootstrapping in the extreme. As the Commission notes, Section 260 does not on its face indicate that it is limited to interLATA telemessaging services. Somehow, the Commission apparently construes this to suggest that because (in its view) Sections 271 and 272 give it expansive authority with respect to intrastate interLATA telemessaging services, the absence of a limitation of its authority to interLATA telemessaging under Section 260 confers upon the Commission jurisdiction over all intrastate telemessaging.

⁹ 47 U.S.C. § 152(b)(1).

¹⁰ The explicit grants of FCC jurisdiction in Sections 271 and 272 override the generic restrictions on FCC jurisdiction in Section 2(b), but these exemptions must be construed narrowly in order to preserve the meaning of Section 2(b). See *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979); *Michigan Citizens for an Independent Press v. Thornburgh*, 868 F.2d 1285, 1292 (D.C. Cir.), *aff’d mem.*, 110 S. Ct. 398 (1989) (citing the interpretive canon that exemptions “should be narrowly construed”).

In essence, the Commission is erroneously suggesting that the very prerequisite to achieving *some* jurisdiction over intrastate services conveys even *broader* authority over intrastate services by its *absence*. The only way the Commission reaches intrastate services at all under Section 271 and 272 is through the specific responsibility granted it with respect to intrastate services that may also be interLATA services. Having achieved some reach over intrastate telemessaging services, however, the Commission cannot now discard the requisite interLATA link and assert jurisdiction over all intrastate telemessaging services. Such convoluted logic and statutory construction is plainly at odds with the clear import of Section 2(b).

In the alternative, the Commission solicits comment on whether, if it does not have direct authority over all intrastate telemessaging services under Section 260, it has authority under *Louisiana PSC*¹¹ to preempt state regulation of intrastate telemessaging services where necessary to implement and enforce its proper regulation under Section 260. Nothing in the 1996 Act alters the Commission's ability to exercise its preemptive powers pursuant to the "impossibility" exception to Section 2(b) recognized in *Louisiana PSC*. Indeed, inconsistent state regulation is preempted as a matter of law if it would "thwart or impede" the Commission's exercise of its lawful authority over interstate communications services, such as when it is not "possible to separate the interstate and intrastate portions of the asserted FCC regulation."¹² However, any articulation of such preemption must be narrowly tailored to preempt only such state regulation that would "*necessarily* thwart or impede" valid FCC actions.¹³ Accordingly, the Commission

¹¹ *Louisiana Public Service Comm'n*, 476 U.S. 355 (1986) ("*Louisiana PSC*").

¹² *Louisiana PSC*, 476 U.S. at 375, n.4.

¹³ *National Ass'n of Regulatory Utility Commissioners v. FCC*, 880 F.2d 422, 430 (D.C. Cir. 1989) (emphasis added).

should refrain from attempting to identify “the extent to which [it] would have authority to preempt *potentially* inconsistent state regulations,”¹⁴ lest any such open-ended assessment be overly broad and therefore reversible.

B. Electronic Publishing

Section 274 of the Act imposes a number of safeguards on the provision by BOCs of electronic publishing through a separated affiliate or electronic publishing joint venture. The Commission solicits comment on the extent of any jurisdiction granted it in this Section over intrastate electronic publishing services by the BOCs.¹⁵

At the outset, the Commission properly notes that Section 274(b)(4) expressly references regulations that may be adopted by state regulators to govern certain transactions between a BOC and a separated electronic publishing affiliate or joint venture.¹⁶ Apparently reading this express acknowledgment by Congress of state regulators’ continuing responsibility for intrastate matters as a *new* grant of limited authority to the states, the Commission tentatively concludes that it “*may* not have exclusive jurisdiction over *all* aspects of intrastate services pursuant to Section 274.”¹⁷ It thus appears that the Commission is asserting that, but for an express grant of responsibility to state regulators, the Commission does (or may) have “exclusive” jurisdiction over intrastate electronic publishing services under Section 274.

The Commission has it backwards. As discussed above, Section 2(b) reserves to the states, not to the Commission, exclusive jurisdiction over “charges, classifications, practices,

¹⁴ Notice at ¶ 21 (emphasis added).

¹⁵ Notice at ¶ 22-24.

¹⁶ Notice at ¶ 23.

¹⁷ Notice at ¶ 23 (emphasis added).

services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier.” Just as Sections 271 and 272 do not give the Commission plenary jurisdiction over intrastate interLATA services, Section 274 does not give the Commission plenary or exclusive jurisdiction over intrastate electronic publishing services. Any Commission jurisdiction over intrastate electronic publishing services in derogation of the expansive reservation of authority to the states under 2(b) would have to be explicit in the Act (it is not) or derived from the impossibility exception under *Louisiana PSC*.

Section 274(e) does nothing to support an inferential assumption of intrastate jurisdiction by the Commission.¹⁸ Procedural provisions in Section 274(e) for complaints or applications for cease and desist orders alleging violations of “this section” to be filed with the Commission provide no direct substantive grant of jurisdiction, nor do they provide a basis for inferring that the Commission has broad jurisdiction over intrastate electronic publishing services. Rather, by referring to violations of “this section,” Section 274(e) complaint and injunctive provisions are limited by their terms to violations of requirements or rules properly adopted under Section 274. In other words, the Commission is empowered under Section 274(e) only to receive complaints or other applications regarding matters over which it had legitimate authority in the first instance. As noted above, the Commission’s jurisdiction over intrastate electronic publishing is limited by Section 2(b), except in the case of express grant of authority or under the “impossibility” exception. Section 274(e) cannot be read to expand that authority.

¹⁸ Notice at ¶ 24. Section 274(e) establishes the rights of parties alleging violations of Section 274 to seek damages and/or obtain injunctive relief before either the Commission or the appropriate district court. 47 U.S.C. § 274(e).

C. Alarm Monitoring Services

Section 275(a)(1) of the Act precludes BOC provision of alarm monitoring services until February 8, 2001, unless such provision is grandfathered under Section 275(a)(2). All other LECs, and BOCs upon becoming authorized to provide such services, are permitted to provide alarm monitoring services without structural separation but subject to general nondiscrimination and nonsubsidy provisions of Section 275(b). Again the Commission inquires as to the extent of its jurisdiction, if any, over intrastate alarm monitoring services as a result of Section 275. And again, the answer is that where Section 275 does not provide any specific grant of jurisdiction over intrastate alarm monitoring services (which it does not), the Commission's reach is "fenced off" by Section 2(b), subject only to the impossibility exception of *Louisiana PSC*.

III. BOC PROVISION OF ELECTRONIC PUBLISHING -- SECTION 274

A. The Commission's Limited Rulemaking Authority Under Section 274

Section 274 (a) provides that

[n]o Bell operating company or any affiliate may engage in the provision of electronic publishing that is disseminated by means of such Bell operating company's or any of its affiliates' basic telephone service, except that nothing in this section shall prohibit a separated affiliate or electronic publishing joint venture operated in accordance with this section from engaging in the provision of electronic publishing.¹⁹

In the remainder of Section 274, Congress set forth in considerable detail the structural separation, joint marketing, and nondiscrimination obligations that are placed on the separate affiliate or electronic publishing joint venture and that define how such an entity is to be "operated in accordance with this section." These requirements of Section 274 are more granular than

¹⁹ 47 U.S.C. § 274(a).

comparable rules the Commission has previously adopted to govern Computer II and cellular structurally separate affiliates²⁰ and are even more detailed than the separate affiliate and nondiscrimination requirements for interLATA services under Section 272. The fact that Congress set forth such comprehensive and detailed requirements instead of expressly leaving the details for the Commission to complete demonstrates that the structural separation, joint marketing, and nondiscrimination requirements of Section 274(b)-(c) are complete unto themselves. By taking this action, Congress made clear its intent that the requirements of Section 274 are not to be supplemented through Commission rulemaking,²¹ other than to specify the manner of valuing and recording transfers of assets pursuant to Section 274(b)(4). Unlike Section 273, which specifically confers authority on the Commission to supplement the statutory structural separation scheme with additional structural regulations,²² Section 274 does not give the Commission the ability to adopt substantive separation rules.

Given this fact, the Commission has no authority to promulgate substantive legislative rules (other than accounting rules) to implement the structural separation and joint marketing requirements of Section 274. The Commission does not have the discretion, in “implementing” Section 274, to add to or deviate from the detailed scheme established by Congress. Commission

²⁰ Compare 47 U.S.C. § 274(b)-(c) with 47 C.F.R. §§ 22.903(b)-(g) (cellular) and 64.702(c)(1)-(5) (Computer II).

²¹ See *American Petroleum Institute v. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995) (“[An agency] cannot rely on its general authority to make rules necessary to carry out its functions when a specific statutory directive defines the relevant functions of [the agency] in a particular area.”); *Ethyl Corp. v. EPA*, 51 F.3d 1053 (D.C. Cir. 1995).

²² 47 U.S.C. § 273. Section 273(g) expressly grants the Commission authority to “prescribe such additional rules and regulations as the Commission determined are necessary to carry out the provisions of this section and otherwise to prevent discrimination and cross-subsidization” with respect to a manufacturing affiliate.

regulation cannot change the plain terms of the statute. Accordingly, the Commission should avoid taking any action that would impose burdens on BOCs' permitted electronic publishing activities beyond those already enumerated by Congress.²³

B. Degree of Separation

Section 274(b) requires both a separated affiliate and an electronic publishing joint venture to be "operated independently" from the BOC and then enumerates specific conditions with which the separate affiliate and/or joint venture must comply to satisfy this statutory standard. As the Commission rightly observes in the *Notice*,²⁴ several of these safeguard conditions apply by their own terms only to BOC provision of electronic publishing through a separate affiliate and not to a BOC's participation in an electronic publishing joint venture. BellSouth thus concurs with the Commission's tentative conclusion that the "operated independently" standard has a different meaning for separated affiliates and electronic publishing joint ventures.²⁵

Congress has made an obvious and overt distinction between the two forms of business operations and the Commission must observe and give effect to that differentiation to fulfill Congressional intent. Thus, the Commission should expressly adopt its tentative conclusions that an electronic publishing joint venture and a BOC may have officers, directors, and employees in

²³ The Commission should also note that Congress gave the BOCs one year from the date of enactment of the 1996 Act to bring existing electronic publishing operations into compliance with "the requirements of *this section*." 47 U.S.C. § 274(g)(1). Congress clearly did not anticipate the Commission's adoption of "implementing regulations" or it would have tied the compliance deadline to such an event or otherwise directed the Commission to conclude such a proceeding by a date certain to give the BOCs adequate time to adjust any operations as necessary. That Congress tied the compliance deadline to its own action and delineation of compliance requirements shows that no elaboration by the Commission was intended by Congress.

²⁴ *Notice* at ¶ 35.

²⁵ *Notice* at ¶ 35.

common (§ 274(b)(5)(A)) and own property in common (§ 274(b)(5)(B)).²⁶ Further, the Commission should affirm that a BOC may perform hiring or training of personnel on behalf of the joint venture (§ 274(b)(7)(A)); perform the purchasing, installation, or maintenance of equipment, including telecommunications transmission equipment and computers, on behalf of the joint venture (§ 274(b)(7)(B)); and perform research and development on behalf of the joint venture (§ 274(b)(7)(C)).²⁷ Finally, the Commission must acknowledge that a BOC and an electronic publishing joint venture may enter into in any other arrangement that is not prohibited by the terms of the Act.²⁸

The Commission also must avoid overly broad interpretation of the provisions of 274(b) that do apply to electronic publishing joint ventures and to separated affiliates. Indeed, the “operated independently” standard is a term adopted by Congress to describe the permissible and impermissible relationships between a BOC and an electronic publishing separated affiliate or joint venture. To the extent Congress saw a need for refinement of the meaning of this standard, it has provided the necessary explication.

The Commission need not and should not attempt to over-define the requirements of Section 274(b) by anticipating every conceivable factual circumstance that might arise in the future in order to establish now how the terms of the Act would apply to a given set of facts.

²⁶ Notice at ¶ 39.

²⁷ Notice at ¶ 44.

²⁸ For example, an electronic publishing joint venture is also permitted to perform hiring or training of personnel or to perform research and development on behalf of the BOC (as is a separate affiliate) since such arrangements are not prohibited by the Act.

Thus, for example, the Commission should not try to conduct a cost/benefit analysis to “establish specific requirements regarding the types of activities that are contemplated by section 274(b)(2)”²⁹ or any other subsection of 274(b). Such a purportedly objective assessment of abstract and prognosticated events has little chance but to result in arbitrary conclusions.

Nor is such an attempt at further detailed delineation of the “operated independently” standard necessary to guide parties’ behavior. The BOCs have much experience operating under structural separation requirements imposed by the Commission, the common cornerstone of which has been an operational independence standard.³⁰ To the extent the Commission has deemed it desirable to clarify the scope of the “operational independence” standard in its Rules, it has done so using terminology substantially identical to that adopted by Congress in refining the meaning of the operational independence standard for Section 274. The Commission obviously has not previously seen a need to codify even further interpretive standards to guide parties under the Computer II or cellular separation rules. And, by the overt omission of a direction for the Commission to do so here, Congress has plainly indicated that no further refinements are intended under Section 274.

Inviting comment on pre-interpretation of Section 274(b) also potentially may lead to extreme and perverse advocacy positions before the Commission. For example, the Commission asks whether the prohibition in Section 274(b)(7) on a BOCs’ performing research and development on behalf of its separated affiliate may be read also to preclude the BOC from

²⁹ Notice at ¶ 38.

³⁰ 47 C.F.R. § 64.702(c)(2) (“Each such separate corporation shall operate independently in the furnishing of enhanced services and customer premises equipment.”); 47 C.F.R. § 22.903(b) (“Separate corporations must operate independently in the provision of cellular services.”).

performing research and development that “may be potentially of use” to the affiliate.³¹ Both from a practical and policy standpoint, such an interpretation would be abhorrent. From a practical standpoint, the BOC would be constrained to anticipate all potential uses of research and development activities it might undertake, and then only pursue those that could not possibly be of use to the separated affiliate. The policy ramifications are just as stark: the suppression of innovative research and development on the mere potential that a BOC’s separated affiliate could make use of it is antithetical to the public interest and national policy under Section 7 of the Communications Act.³² Yet, the Commission’s very solicitation of comments addressing such a view is likely to foster its share of proponents bent on imposing on the BOCs the most onerous burdens to which the Commission will accede.³³ Rather than indulging such proposals, the Commission should simply adhere to the language of the Act as the clearest expression of Congressional intent.

Similarly, the Commission should reject any suggestions to interpret Section 274(b)(5) in a way that would “reduce the efficiencies generally associated with joint marketing ventures,”³⁴ such as those activities expressly permitted by Section 274(c)(2). Section 274(b)(5)(A) by its

³¹ *Notice* at ¶ 46.

³² 47 U.S.C. § 7(a) (“It shall be the policy of the United States to encourage the provision of new technologies and services to the public.”).

³³ In a similar vein, the Commission somewhat ambiguously asks for comment on “other ways in which [Section 274(b)(7)] may limit a BOC’s ability to perform research and development generally.” *Notice* at ¶ 46. To the extent opposing parties construe this request as an invitation for plausible interpretations of that provision in a way to further constrain BOC research and development activity, the Commission should promptly reject any such suggested interpretations and conclude that any activities that would be constrained by such interpretations are expressly permitted.

³⁴ *Notice* at ¶ 40.

terms prohibits a BOC and its separated affiliate from having “officers, directors, and employees in common.” The meaning of this provision is straightforward: an officer, director, or employee of a BOC may not also be an officer, director, or employee of the separated affiliate. Such a preclusion of dual employment of an individual, however, does not operate as a limitation on otherwise permitted joint marketing of the respective entities’ products under Section 274(c)(2). Thus, employees of the respective entities are permitted to engage in coordinated activities necessary and useful to the implementation of permitted joint marketing operations.

By the same token, the prohibition in Section 274(b)(5)(B) against a BOC and its separated affiliate owning property in common is clearly and simply that. It is not a prohibition on shared lease arrangements,³⁵ landlord-tenant relationships, or any other property arrangement that falls short of common ownership. The Commission must avoid imposing on the BOCs constraints on such arrangements that Congress has already chosen not to impose.

C. Separation Between Affiliates

Manufacturing activities and interLATA telecommunications and information services (excluding electronic publishing and alarm monitoring service) that are not subject to exceptions of Section 272(a)(2)(B) are subject to the separation requirements of Section 272(b). The Commission has proposed in the *BOC In-Region NPRM* that all such activities could be conducted through the same separated affiliate. In the instant *Notice*, the Commission inquires whether electronic publishing activities also could be conducted through that same entity.³⁶

³⁵ Any such shared contractual responsibility would, of course, be subject to the strictures of Section 274 (b)(2) that a creditor of the separated affiliate not have recourse to the assets of the BOC upon default on debt by the separated affiliate.

³⁶ *Notice* at ¶ 48.

Clearly, nothing in the Act precludes the separated affiliates of a BOC from taking advantage of any efficiencies that the consolidation of operations might permit. To conclude otherwise would be to require stand-alone operation by the BOCs' affiliates and thereby deprive them of opportunities for productivity that are available to their competitors. Moreover, if the separated affiliate as a whole is structured in accordance with the more demanding separation requirements of Section 274, the combining of operations in the single affiliate can reduce the need for attempting to draw fine lines between those activities that constitute electronic publishing and those that are otherwise interLATA information services.³⁷

D. Joint Marketing

Section 274(c)(1) "[i]n general" prohibits a BOC from "carry[ing] out any promotion, marketing, sales, or advertising for or in conjunction with a separated affiliate"³⁸ and from "carry[ing] out any promotion, marketing, sales, or advertising for or in conjunction with an affiliate that is related to the provision of electronic publishing."³⁹ Notwithstanding these general proscriptions, Section 274(c)(2) describes three "[p]ermissible joint activities,"⁴⁰ each subject to certain conditions. The Commission seeks comment on the meanings and interrelationships of these provisions.⁴¹

³⁷ See, *Notice* at ¶ 47. Of course, even after a BOC has met the more demanding structural separation requirements, an inquiry as to whether an activity is an interLATA telecommunications service, interLATA information service, or electronic publishing service still may be necessary for purposes of determining the joint marketing conditions applicable to that activity.

³⁸ 47 U.S.C. § 274(e)(1)(A).

³⁹ 47 U.S.C. § 274(c)(1)(B).

⁴⁰ 47 U.S.C. § 274(c)(2).

⁴¹ *Notice* at ¶¶ 49-63.

The Commission first inquires as to the significance of the distinction between Sections 274(c)(1)(A) and 274(c)(1)(B). Subsection (B) is intended to address the situation in which an affiliate offers services, some of which are electronic publishing (or “related” thereto) and some of which are not. An example would be a BOC affiliate which publishes directories as well as provides electronic publishing. By omitting the word “separated”, Congress helped to clarify that some of an “affiliate’s” activities may be *unrelated* to electronic publishing. Through such wording, Congress indicated that joint marketing between a BOC and *any* affiliate, separated or not, is permitted if the activity is not “related to the provision of electronic publishing.” A BOC could thus engage in promotion, marketing, sales or advertising with its directory affiliate as long as such activity related to the traditional directory products of the directory affiliate rather than any electronic directory products.

BellSouth concurs with the Commission’s assessment that 274(c)(1)(B), which restricts a BOC’s marketing activities with “an affiliate,” does not apply to an electronic publishing joint venture in which the BOC participates.⁴² As the Commission notes, a BOC is expressly permitted to “provide promotion, marketing, sales, or advertising personnel”⁴³ to the joint venture in which it participates, implicitly to “carry out any promotion, marketing, sales, or advertising”⁴⁴ in furtherance of the joint venture’s interest. Were the joint venture deemed an affiliate, the very activity permitted under Section 274(c)(2)(C) would be precluded by Section 274(c)(1)(B).⁴⁵ In

⁴² Notice at ¶ 51.

⁴³ 47 U.S.C. § 274(c)(2)(C).

⁴⁴ 47 U.S.C. § 274(c)(1)(B).

⁴⁵ Of course, even if a joint venture were deemed an affiliate, the “permissible joint activities” specifically delineated under Section 274(c)(2) are expressly excepted from, and would otherwise take precedence over, the “general” prohibitions of Section 274(c)(1).

interpreting the Act, the Commission must do so in a manner that avoids internal contradictions. Here, the Commission has proposed the appropriate result.

Section 274(c)(2)(A) permits a BOC to provide “inbound telemarketing or referral services . . . for a separated affiliate, electronic publishing joint venture, affiliate, or unaffiliated electronic publisher.” If the BOC provides such service to any of the first three, it must make “such services . . . available to all electronic publishers on request, on nondiscriminatory terms.” Curiously, after reciting these requirements, the Commission asserts that “[t]he statute is silent as to the specific types of obligations [this section] imposes on a BOC.”⁴⁶ To BellSouth, the statute speaks loudly and precisely. When a BOC provides inbound telemarketing, which the Act defines as “the marketing of property, goods, or services by telephone to a customer or potential customer who initiated the call,”⁴⁷ as a service to a separated affiliate, electronic publishing joint venture, or affiliate, the BOC must make such telemarketing service available 1) to all electronic publishers, 2) on request, and 3) on nondiscriminatory terms. The same goes for a referral service. No further elucidation of these requirements is needed.

In addition to telemarketing and referral services, the Act permits a BOC to enter into “teaming” or other “business arrangements” with its separate affiliate to engage in electronic publishing as long as the BOC “only provides facilities, services, and basic telephone service information” and the BOC “does not own such teaming or business arrangement.”⁴⁸ By this latter

⁴⁶ Notice at ¶ 55.

⁴⁷ 47 U.S.C. § 274(i)(7).

⁴⁸ 47 U.S.C. § 274(c)(2)(B).

provision, it is apparent, contrary to the Commission's suggestion,⁴⁹ that the permitted teaming or business arrangement is more substantial than a coordinated joint marketing or sales campaign or joint bid preparation arrangement.⁵⁰ By reference to "ownership", the Act contemplates an ongoing business enterprise engaged in electronic publishing in which the BOC may have a 10 percent or lower equity interest or a right to 10 percent or less of the gross revenues.⁵¹

The Commission also inquires as to the nature of the nondiscrimination obligation attaching to a BOC engaged in such a teaming or business arrangement. Obviously, the obligation cannot be that a BOC must invest or otherwise obtain an equity stake in an entity not of its choosing merely because the BOC has chosen to obtain such an interest in a particular enterprise. Rather, the term should be given its common meaning: that the BOC may not give preference to the "teaming or business arrangement" enterprise in the BOC's conduct of its regulated common carrier operations.

⁴⁹ Notice at ¶ 57 (suggesting that Section 274(c)(2)(B) might apply only to "joint marketing arrangements" rather than to "any type of business arrangement to engage in electronic publishing" subject to the conditions of that section).

⁵⁰ Cf., *Pacific Bell Petition for Declaratory Ruling or Waiver of Section 64.702 of the Commission's Rules to Enable Pacific Bell to Offer Network Services Through a Joint Venture*, File No. ENF 85-15, 1985 FCC LEXIS 3000 (rel'd July 8, 1985) (*Pacific Bell Order*). Moreover, in contrast with a limitation imposed in the *Pacific Bell Order* regarding the participation by Pacific Bell's separate CPE affiliate in the joint bid program, Section 274(c)(2)(B) expressly contemplates a "teaming or business arrangement to engage in electronic publishing with any separated affiliate."

⁵¹ Section 274(i)(8) establishes that "[t]he term 'own' with respect to an entity means to have a direct or indirect equity interest (or the equivalent thereof) of more than 10 percent of an entity, or the right to more than 10 percent of the gross revenues of an entity under a revenue sharing or royalty agreement." Thus, a BOC may have up to a 10 percent ownership interest in a teaming or other business arrangement with its separated electronic publishing affiliate.

The third joint activity in which a BOC is permitted to engage is an electronic publishing joint venture. Section 274(c)(2)(C) expressly permits a BOC or affiliate “to participate on a nonexclusive basis in electronic publishing joint ventures with entities that are not a [BOC], affiliate, or separated affiliate to provide electronic publishing services.”⁵² The Commission solicits comment on the nature of this nonexclusivity provision.⁵³

The intent of the nonexclusivity provision appears to be to preclude a BOC’s joint venture partner from insisting on having an exclusive arrangement with the BOC to the detriment of other entities with whom the BOC might wish to partner.⁵⁴ Thus, a BOC is not permitted to enter into a joint venture with one partner to the necessary exclusion of all others. Conversely, however, a BOC is not obligated to participate in more than one joint venture. Were that the case, a potential joint venture arrangement between a BOC and its intended partner could not be consummated until the BOC located and negotiated with another partner with whom to establish a joint venture. Had Congress intended such a bizarre sequence of events in commercial deal making, it would have been more specific. The better reading of the term is simply that neither party to the joint venture can insist upon being the only partner with whom the other party engages in electronic publishing.

⁵² 47 U.S.C. § 274(c)(2)(C).

⁵³ *Notice* at ¶ 63.

⁵⁴ Alternatively, this provision may be read as permissive rather than mandatory. That is, Congress may have included the nonexclusivity provision to emphasize that a BOC is permitted, but not required, to enter multiple joint venture agreements -- hence, the permissive language “*may* participate on a nonexclusive basis.” Congress could have felt that such clarification was necessary to stave off potential claims of those seeking to curtail BOC participation in electronic publishing that a BOC should not be permitted to spread its electronic publishing interests through multiple joint ventures. In contrast, had Congress intended this provision to be mandatory rather than permissive, it would have used more limiting language, such as “*may* participate *only* on a nonexclusive basis.”